Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether appellate review of a trial court's interpretation of the terms of a plea agreement should be for "clear error," as the Seventh, Ninth and Tenth circuits hold, or should be "*de novo*," as the Second, Fourth, Sixth, Eighth and District of Columbia circuits hold.

2. Whether the plea-agreement "analogy" to contract law suggested in *Blackledge v. Allison*, 431 U.S. 63 (1977), permits a strict application of the parol evidence rule in interpreting a written plea agreement such that no extrinsic evidence of a defendant's reasonable understanding is permitted.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Rockwell International Corporation

Boeing North American, Inc., a wholly owned subsidiary of The Boeing Corporation

Boeing Australia, Ltd.

Boeing Capital Corporation

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The court of appeals' opinion is reported at 124 F.3d 1194 (10th Cir. 1997), reprinted in the appendix, at pages 1a-15a. The district court's unpublished, November 19, 1996, memorandum opinion is reprinted in the appendix, at pages 16a-26a.

JURISDICTION

The court of appeals' opinion affirming the district court's order was entered on August 26, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 15, 1997. App. 27a-28a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. 5: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

This petition presents two important issues of federal criminal law, as to each of which the courts of appeals have rendered conflicting holdings. The federal circuits disagree on the question whether district court interpretations of plea agreements should be reviewed under a *de novo* or a "clear error" standard. And federal courts

of appeals apply differing interpretations of the "parol evidence" rule in allowing – or precluding – evidence of a defendant's reasonable understanding of the terms of a written plea agreement.

The Tenth Circuit, in its ruling below, declined to conduct *de novo* review of a district court's facial interpretation of a plea agreement. The court of appeals also applied a strict "parol evidence rule" to preclude consideration of evidence shedding light on the meaning of a key provision in that plea agreement, while conceding that a reasonable interpretation of the proffered evidence supported the defendant's understanding of that provision. The Tenth Circuit's ruling effectively foreclosed enforcement of a government promise that induced guilty pleas to 10 criminal charges, despite the undisputed fact that the corporate defendant paid substantial monetary consideration for that very promise. The court's standard of review and its application of the parol evidence rule to a written plea agreement in a criminal case differ from the standards applied to the interpretation and review of contractual documents in civil disputes. The result here was fundamentally unfair and effectively imposed on corporate criminal defendants a heavier burden of proof than is applied to individuals who seek enforcement of their rights under a plea agreement. On both of these issues – the standard of review and the application of the parol evidence rule – the Tenth Circuit is in conflict with many other circuits.

This case arises out of a highly publicized investigation of environmental problems at the federal government's Rocky Flats nuclear weapons facility near Denver, Colorado. Until 1990 Rockwell International Corporation

["Rockwell"] managed the facility under contract with the United States. In June 1989 the investigation commenced with the issuance of a search warrant premised on sensational allegations that Rockwell and the Department of Energy ["DOE"] had conducted surreptitious burnings and discharges of radioactive material into the air and water. Although the government later acknowledged that these allegations were unfounded, it conducted a three-year grand jury investigation into all aspects of environmental management at the plant.

The investigation culminated in 1992 with a written plea agreement. Under the agreement, Rockwell pled guilty to 10 counts charging that it illegally stored and disposed of hazardous wastes at the plant and violated the Clean Water Act. Four of the charged violations related to the failure of Rockwell and DOE to obtain permits for the storage of mixed radioactive and hazardous wastes. Because DOE is a federal agency, it enjoyed sovereign immunity and could not be charged with a crime or subjected to a civil penalty. *See, e.g., United States Dep't of Energy v. Ohio,* 503 U.S. 607, 615-23 (1992); *Mitzelfelt v. Department of Air Force,* 903 F.2d 1293, 1294-95 (10th Cir. 1990); *Sierra Club v. United States Dep't of Energy,* 770 F. Supp. 578, 584 (D. Colo. 1991). As to all the charges, the government stipulated that no hazardous substances had migrated outside the plant's boundaries.

In exchange for Rockwell's guilty pleas and a stipulated $18.5 million fine, the government promised not to bring additional charges against Rockwell or its employees and to forbear from administrative action against Rockwell under a number of environmental statutes. Paragraph 5 of the plea agreement recited that the

government's promise not to sue Roockwell did not "encompass (or preclude) . . . the issuues raised in" a pending *qui tam* action brought under 331 U.S.C. § 3230 (1994) and captioned *United States ex rel. Stone v. Rockwell International Corp.* ["*Stone*"], No. 89-M-1154 (D. Colo.). Immediately after this paragraph, the aggreement stated, "After an independent review, the Departtment of Justice-Civil Division has determined to file a notice in *Stone* declining to intervene" [hereinafter "deeclination provision"].

The plea agreement also contained an "integration clause," which provided that there were no other agreements, terms or conditions, express or imnplied, and that neither party was relying on any termns, promises or conditions not expressed in the agreemeent.

The *Stone* case was a pending *qui tam* suit brought in 1989 by a former Rockwell employee. The suit's claims loosely tracked the allegations in the fedeeral search warrant affidavit that had initiated the criminaal investigation.

During the plea negotiations, the U.S. Department of Justice ["DOJ"] was weighing whether to exercise its statutory right to intervene and prosecutee the *Stone* suit. Because government intervention allows aa "false claims" suit to be vastly expanded in scope,[1] Rocckwell sought a

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[1] When the government intervenes, as it ultimately did in *Stone*, it typically adds breach of contract andd tort claims not available to a private plaintiff and is not subjecct to the statutory "original source" rule which limits the claimns of the private plaintiff by requiring them to be based on infoormation which is not in the public domain unless the plaintiff wwas the "original source."

plea agreement that would foreclose government intervention in *Stone* unless the government discovered substantial new evidence of misconduct subsequent to the plea. A meeting was held in Washington, D.C., between Rockwell lawyers and attorneys from DOJ's Civil and Criminal Divisions to discuss Rockwell's concerns. At that meeting, according to the Rockwell lawyers, the Civil Division attorneys stated they did not intend to intervene but would not foreclose intervention in the future if substantial new evidence of fraud were discovered after the plea. Subsequent to that meeting, and with DOJ concurrence, Rockwell provided Civil Division lawyers with numerous internal investigative memoranda and documents that were not otherwise available to the government because they were privileged. These documents and reports were inculpatory to Rockwell. DOJ-Civil accepted them on the express understanding that they were being tendered to foreclose a later government intervention in the *Stone* suit based on the claim that DOJ had been ignorant of the inculpatory facts.

Because the plea agreement engendered great public controversy, the prosecutors who negotiated it testified before a congressional committee. DOJ prosecutor Peter Murtha defended the plea agreement's declination provision:

> I think the Civil Division's decision here [to decline intervention], although expedited, was not necessarily a terribly difficult one to make. And if new information came to their attention, they could have intervened based on that new information.

Prosecutor Kenneth Fimberg also defended the declination concession, pointing out that he had extracted substantial additional fines (about $3 million) for this "additional value."

The district court accepted the plea agreement in June 1992, and Rockwell paid the stipulated $18.5 million in fines. Rockwell did so in the belief that the government would not and could not thereafter intervene in *Stone* absent a showing of substantial new evidence of fraud. In November 1995 – some six and a half years after the *qui tam* suit was filed – the government moved to intervene in *Stone*. Rockwell opposed the motion and responded by moving in the criminal action to enforce the declination provision of the plea agreement. Rockwell argued that the government should be barred from intervening in *Stone* because the government had no significant new evidence of fraud or misconduct. Rockwell proffered evidence in support of its motion which demonstrated the following:

- Rockwell's executives and attorneys understood that the declination provision barred intervention unless the government discovered substantial new evidence of fraud or misconduct.
- There was no such "new evidence."
- Rockwell's understanding of the declination provision was reasonable, in part because the government attorneys had deliberately induced it and, according to the testimony of prosecutor Murtha, shared that understanding. Rockwell's understanding was also reasonable because it was supported by legislative history and case law interpreting

the *qui tam* statute's "late intervention" provision, which requires "good cause," 31 U.S.C. § 3730(c)(3), rooted in substantial new evidence.[2]

- The government's motivation in seeking late intervention in *Stone* was to obtain tactical advantage in an action brought by Rockwell in the Court of Federal Claims arising from the Rocky Flats contract. In 1996, that case was indefinitely stayed on the government's motion, which cited the intervention in *Stone* as cause for a stay because the *Stone* litigation might void Rockwell's contract claims.

The district court denied Rockwell's motion to enforce the plea agreement. The court refused to consider the evidence that Rockwell had tendered, holding that under its interpretation of the plea agreement there was no ambiguity, *see* App. 21a, and that the declination provision was "simply a statement of fact" which "did not, by its own terms, preclude later intervention" for any

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[2] *See* S. Rep. No. 345, 99th Cong., 2d Sess. 26-27 ("Conceivably, new evidence discovered after [the government elects not to intervene] could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph [(c)(3)] provides that the court may allow the Government to take over the suit."), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92; *United States ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995) (holding that discovery of "new and significant evidence which has altered [the government's] view of the magnitude of the alleged fraud [is] precisely the circumstance[] which Section 3730(c)(3) was intended to address").

reason the government deemed expedient. *Id.* The district court further held that case law construing plea agreements according to the reasonable understanding of the defendant was not applicable "where the defendant is a corporation." App. 24a. In effect, the district court held that the declination provision – for which Rockwell bargained and paid an additional $3 million – gained it nothing.

Reviewing the trial court's "interpretation of the agreement . . . for clear error," the Tenth Circuit affirmed. App. 8a. The Tenth Circuit's opinion acknowledged that the evidence tendered by Rockwell in support of its motion "confirm(ed) Rockwell's reasonable understanding that the definition of 'good cause' seriously circumscribed the government's ability to later intervene." App. 7a-8a. However, the court declined to review this evidence, *or* the plea agreement, *de novo*. Rather, the court held that neither it nor the trial court could consider any evidence regarding the parties' intentions or understandings because "[t]he parol evidence rule bars the court from considering evidence of terms outside of an integrated written agreement." App. 9a. The court further held that the trial court's characterization of the declination provision as only "a statement of fact" was "not clearly erroneous" and thus declined to afford *de novo* review to that interpretation either on its face or with the gloss of Rockwell's proffered evidence. App. 8a-13a.

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over this case under 18 U.S.C. § 3231 (1994); *see Lane v. Williams*, 455 U.S. 624, 630 (1982); *Santobello v. New York*, 404 U.S. 257, 262 (1971).

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided on the important question of what deference, if any, to give the district court's interpretation of a plea agreement.

The Tenth Circuit Court of Appeals applied a "clear error" standard in declining to undertake independent review of the district court's conclusion – from a facial review of the plea agreement – that the declination provision was merely a "statement of fact" having no promissory significance.

The Tenth Circuit thus joined two other circuits, the Seventh and the Ninth circuits, in holding that a trial court's interpretation of a plea agreement may be reviewed only for clear error. The Seventh Circuit has consistently held it will review a trial court's interpretation of a plea agreement only for clear error.[3] The Ninth and Tenth circuits years ago – mostly in unpublished

[3] *United States v. Gonzalez*, 112 F.3d 1325, 1327 (7th Cir.), *cert. denied*, 118 S. Ct. 396 (1997); *United States v. Lovell*, 81 F.3d 58, 61 (7th Cir. 1996); *United States v. Rourke*, 74 F.3d 802, 805 (7th Cir.), *cert. denied*, 116 S. Ct. 1840 (1996); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985). In the cases where *certiorari* was denied, the standard of review issue was not raised.

decisions – had held that a trial court's interpretation of an integrated plea agreement must be reviewed *de novo*.[4] But more recently these two circuit courts have abandoned that standard and concluded that a trial court's interpretation of the plea agreement may only be reviewed for *clear error* – the Tenth Circuit in two recent published opinions,[5] and the Ninth Circuit in more than two dozen recent published and unpublished opinions.[6]

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[4] *See United States v. Pancal*, 999 F.2d 548, 1993 WL 265153, at *2 (10th Cir. 1993); *United States v. Mohammed*, 974 F.2d 1344, 1992 WL 217813, at *1 (9th Cir. 1992); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989); *United States v. Salcedo*, 865 F.2d 266, 1988 WL 131745, at *1 (9th Cir. 1988). In the cases where *certiorari* was denied, the standard of review issue was not raised.

[5] *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997); *Allen v. Hadden*, 57 F.3d 1529, 1534 (10th Cir.), *cert. denied*, 116 S. Ct. 544 (1995).

[6] *See, e.g., United States v. Cornell*, 121 F.3d 718, 1997 WL 419049, at *2 (9th Cir. 1997); *United States v. Anthony*, 93 F.3d 614, 616 (9th Cir. 1996); *United States v. Barraza*, 87 F.3d 1323, 1996 WL 338357, at *3 (9th Cir. 1996); *United States v. Lane*, 95 F.3d 1159, 1996 WL 481797, at *1 (9th Cir. 1996); *United States v. Ajugwo*, 82 F.3d 925, 928 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997); *United States v. Silva-Zamudio*, 73 F.3d 371, 1995 WL 761657, at *1 (9th Cir. 1995); *United States v. Bines*, 64 F.3d 667, 1995 WL 490152, at *8 (9th Cir. 1995), *cert. denied sub nom. Martin v. United States*, 116 S. Ct. 538 (1995) *and Johnson v. United States*, 116 S. Ct. 734 (1996); *United States v. Pinkney*, 37 F.3d 1507, 1994 WL 534697, at *2 (9th Cir. 1994); *United States v. Floyd*, 1 F.3d 867, 869 (9th Cir. 1993); *United States v. Conkins*, 9 F.3d 1377, 1381 (9th Cir. 1993); *United States v. Fernandez*, 960 F.2d 771, 772 (9th Cir. 1992); *United States v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1989); *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835 (1986).

The D.C., Second, Fourth, Sixth and Eighth circuits, however, have rejected the "clear error" standard: they uniformly hold that a trial court's interpretation of an integrated plea agreement must be reviewed *de novo*.[7]

The states also do not agree with one another. *Compare St. James v. People*, 1997 WL 757895, at **3-4 (Colo. Dec. 8, 1997) (noting that "courts are divided concerning the standard of appellate review to be applied to a trial court's determination of whether a plea agreement has been violated," and holding that in Colorado *de novo* review is proper to review meaning of plea agreement while "clear error" is proper standard for reviewing findings of breach of plea agreement) *with State v. Abbott*, 901 P.2d 1296, 1298 (Haw. Ct. App. 1995) ("Disputes over the meaning of plea agreements involve questions of fact, and our review of factual determinations made by a trial court is governed by the 'clearly erroneous' standard. . . . Whether the State has actually breached the terms of a plea agreement, however, is a question of law, which we review *de novo*. . . . ") (citing *State v. Adams*, 879 P.2d 513, 516 (Haw. 1994)).

Thus, the question is presented: should the terms of a plea agreement be reviewed *de novo* or only for clear error?

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[7] *See, e.g., United States v. Camacho-Bordes*, 94 F.3d 1168, 1173 (8th Cir. 1996); *United States v. Martin*, 25 F.3d 211, 217 (4th Cir. 1994); *United States v. Legg*, 7 F.3d 236, 1993 WL 393080, at *2 (6th Cir. 1993); *United States v. West*, 2 F.3d 66, 69 (4th Cir. 1993); *United States v. Pollard*, 959 F.2d 1011, 1033 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992); *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990).

The difference between "*de novo*" review and "clear error" review of a trial court's interpretation of a plea agreement is the difference between, on the one hand, an appellate court's "close scrutiny"[8] and "[i]ndependent review," *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996), and, on the other hand, a "sweeping deference," *id.*, to the trial court which constrains an appeals court to "accept the trial court's findings" unless it is "left with the definite and firm conviction that a mistake has been committed," *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (internal quotations and footnote omitted). The difference is, in the end, enough to change the outcome of an appeal.

There was such a difference in *Rockwell*. The Tenth Circuit acknowledged that Rockwell's proffered evidence demonstrated it *reasonably* understood the government was "seriously circumscribed" in its obligation to later intervene. App. 7a-8a. However, by employing the "clear error" standard, the Tenth Circuit left unchallenged the trial court's implicit conclusion that Rockwell "unreasonably" believed the declination provision had some substance, and its explicit conclusion that the declination provision was not a promise but merely a meaningless "statement of fact." In effect, the courts below refused to give effect to Rockwell's belief that DOJ could not intervene in *Stone* absent significant new evidence, even though that belief had a reasonable basis. The trial court's "cramped understanding," *United States v. Hyde*, 117 S. Ct. 1630, 1635 (1997) inexplicably "strip[ped the declination

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[8] *Pierce v. Underwood*, 487 U.S. 552, 586 (1988) (White, J., concurring in part and dissenting in part).

provision] of any meaning," *id.* at 1634; *see Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (disapproving interpretation of plea agreement that "would render the agreement meaningless"), and merited the scrutiny of *de novo* review.

In the context of facial review of written plea agreements, *de novo* review makes sense. The trial court has no "superiority," *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991), over the appellate court such that deference by the appellate court is necessary or desirable. In the civil context, all the circuits, including the Seventh, Ninth and Tenth circuits, hold that contract interpretations are subject to *de novo* review. *See, e.g., Reese Exploration, Inc. v. Williams Nat. Gas Co.*, 983 F.2d 1514, 1518-19 (10th Cir. 1993); *National Diamond Syndicate, Inc. v. United Parcel Serv., Inc.*, 897 F.2d 253, 256 (7th Cir. 1990); *Lawyers Title Ins. Corp. v. Honolulu Fed. Sav. & Loan Ass'n*, 900 F.2d 159, 162 (9th Cir. 1990); *see also Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1394-96 (1996) (holding that patent terms must be construed by court as questions of law); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (holding that trust agreements are construed *de novo* "without deferring to either party's interpretation"); *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (Learned Hand, J.) ("[A]ppellate courts have untrammeled power to interpret written documents."), *cert. denied sub nom. Prudence Realization Corp. v. Eddy*, 333 U.S. 845 (1948). There is no rational basis for greater appellate deference in a criminal context.

In *Ornelas v. United States*, 116 S. Ct. 1657 (1996), the Court held that "clear error" review of questions that have constitutional dimensions is reserved for findings of fact. 116 S. Ct. at 1661 n.3. *Ornelas* further held that in a

fourth amendment context, a trial court's determinations of "mixed questions of law and fact" – what constitutes probable cause and reasonable suspicion – must be reviewed under a *de novo* standard. Review for "clear error," the Court held, was inappropriately deferential and inimical to uniformity in constitutional interpretation. 116 S. Ct. at 1662.

Ornelas rests upon a desire for consistency of results on similar facts.[9] Such consistency promotes respect for law. Given the importance of plea bargains in the administration of justice, the same rationale requires *de novo* review of such bargains. The criminal law takes extraordinary care to ensure that plea agreements – the instrument by which some 90% of all criminal cases terminate[10] – are voluntary and that each party gets what it bargained for.

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[9] The Seventh Circuit has noted that "[a]lthough *Ornelas* dealt with the determinations of reasonable suspicion and probable cause in Fourth Amendment jurisprudence . . . the rationale of *Ornelas* cannot be limited, in a principled manner, to that single area of jurisprudence." *United States v. Mills*, 122 F.3d 346, 348 (7th Cir.), *cert. denied*, 1997 WL 713549, No. 97-6692 (Dec. 15, 1997). Indeed, this Court has remanded "for further consideration in light of *Ornelas*" two cases involving fifth amendment voluntariness of a confession where the Seventh Circuit had previously reviewed a circuit court's conclusions only for "clear error." *See Mills v. United States*, 117 S. Ct. 478 (1996); *Baldwin v. United States*, 116 S. Ct. 1873 (1996).

[10] *See* U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics 1996*, at 420 tbl. 5.5 (Kathleen Maguire & Timothy J. Flanagan eds.) (fiscal year 1996); *see also Town of Newton v. Rumery*, 480 U.S. 386, 396 n.6 (1987) (plurality opinion) (noting that in 1985 only 12.8% of all criminal cases resulted in trial).

While the Court has recognized that plea agreements are an "essential" and "highly desirable" part of the criminal-justice process, *Santobello v. New York*, 404 U.S. 257, 261 (1971), it has also said that the plea-bargaining process must be "[p]roperly administered," *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), "to insure the defendant what is reasonably due in the circumstances," *Santobello*, 404 U.S. at 262. The "[p]roper[] administ[ration]" of the plea-bargaining process and our "unitary system of law," *Ornelas*, 116 S. Ct. at 1662, require that there be a single standard among all the sister circuits for reviewing plea agreements to determine whether the defendant has received what it is constitutionally due. There is no good reason to exclude from *de novo* review a trial court's "ultimate determinations" regarding plea agreements, especially where the determinations rested only on a facial review of the written document.

Whether "*de novo*" or "clear error" review most properly gives the criminal defendant what the due process clause reasonably requires is a question of vital importance in the proper administration of the plea-bargaining process. The courts of appeals do not agree on the resolution of this question. This Court's intervention is warranted.

II. Strict application of the parol evidence rule to integrated plea agreements undercuts the due process clause's concern for reasonableness to the defendant, but the courts of appeals disagree on the rule's application.

"[T]o insure the defendant what is reasonably due," *Santobello v. New York*, 404 U.S. 257, 262 (1971), the due

process clause requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," *id.*; *accord Mabry v. Johnson*, 467 U.S. 504, 509 (1984).

Consistent with *Santobello's* mandate, federal courts of appeals have uniformly held that the test for determining whether the government has violated the terms of a plea agreement is "what the defendant reasonably understood when the guilty plea was entered."[11] Because the government is held to a high standard of good faith and fair dealing in the plea bargaining process, *see United States v. Cooper*, 70 F.3d 563 (10th Cir. 1995), some courts of appeals have held that the interpretive rules for the construction of plea agreements are unique. *See United States v. Ready*, 82 F.3d 551, 558-559 (2d Cir. 1996) (holding that if defendant's understanding of promise is reasonable, it controls, and ambiguities are construed strictly against government); *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (same).

While many courts of appeals have held that the due process clause does not permit the language of a plea

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[11] *E.g.*, *United States v. Veri*, 108 F.3d 1311, 1313 (10th Cir. 1997); *United States v. Conway*, 81 F.3d 15, 17 (1st Cir. 1996); *United States v. Wittie*, 25 F.3d 250, 262 (5th Cir. 1994), *aff'd sub nom. Witte v. United States*, 515 U.S. 389 (1995); *United States v. Bugusz*, 43 F.3d 82, 94 (3d Cir. 1994), *cert. denied sub nom. O'Rourke v. United States*, 514 U.S. 1090 (1995); *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994) (per curiam); *Stern v. Shalala*, 14 F.3d 148, 150 (2d Cir. 1994); *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992); *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992).

agreement to be subject to a "rigidly literal construction,"[12] several – including the court below in *Rockwell* – have employed a version of contract law's "parol evidence rule" to defeat a defendant's reasonable understanding of the government promise. By strictly applying a "parol evidence" rule to plea agreements, the court below committed compound error: it not only violated Rockwell's right to due process, but it also misconstrued the role of the parol evidence rule in the construction of any "contract."

A. Due process forbids a strict application of the parol evidence rule to integrated plea agreements.

The "analogy" between plea agreements and contract law suggested in *Blackledge v. Allison*, 431 U.S. 63 (1977), is an uneasy one. This Court has said that the analogy between plea agreements and civil contracts is "not complete," *Town of Newton v. Rumery*, 480 U.S. 386, 393 n.3 (1987), and the circuit courts have consistently declared that the application of contract law to plea agreements must be tempered with the recognition that a defendant's "contract rights" in a plea agreement ultimately are grounded on the Constitution, *see, e.g., United States v. Smith*, 976 F.2d 861, 863 (4th Cir. 1992) (in interpreting

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[12] *E.g., United States v. Hawley*, 93 F.3d 682, 692 (10th Cir. 1996); *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995); *United States v. Ingram*, 979 F.2d 1179, 1185 (7th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *United States v. Johnson*, 979 F.2d 396, 399-400 (6th Cir. 1992); *In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986); *United States v. Harvey*, 791 F.2d 294, 300-01 (4th Cir. 1986).

immunity and plea agreements, "we must be mindful of the fact that the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law") (internal quotations omitted).

This uneasy analogy finds no rest in the contract law's so-called parol evidence rule:[13] the circuit courts are split over how and to what extent it should be applied to plea agreements. The First, Third and Fourth circuits have held that the parol evidence rule must be "relaxed" in the context of interpreting plea agreements. As the Third Circuit stated:

> Because of the unique nature of a plea bargain, involving as it does the waiver of constitutional rights, we believe the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement. Thus, evidence of a prior draft plea agreement, or of statements made by the prosecution during the plea bargaining which sheds light on the meaning of a pertinent word or phrase in an "integrated" plea agreement would be admissible.

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[13] The traditional view is that the "parol evidence" rule excludes extrinsic evidence introduced to vary, add to or contradict the terms of an integrated, unambiguous contract. *See, e.g., Rockwell,* App. 9a-10a; *but see* Restatement (Second) of Contracts § 214 & comment a (1981) (stating modern view of parol evidence rule that extrinsic evidence is not permitted to "contradict," but may be used to interpret, a contract when parties disagree over meaning of its terms, even if contract is integrated and "unambiguous"); *id.* § 215 comments a & b.

United States v. Swinehart, 614 F.2d 853, 858 (3d Cir.), *cert. denied*, 449 U.S. 827 (1980); *accord Kingsley v. United States*, 968 F.2d 109, 114-115 (1st Cir. 1992); *United States v. Garcia*, 956 F.2d 41, 42-44 (4th Cir. 1992).

The other circuit courts that have applied the parol evidence rule to plea agreements have done so strictly: they prohibit *any* extrinsic evidence to add to, vary or contradict an "unambiguous," "integrated" agreement. *See, e.g., United States v. Ajugwo*, 82 F.3d 925, 928 (9th Cir. 1996) (refusing to apply "relaxed" parol evidence rule: "[W]e refuse[] to consider parol evidence for the purpose of adding terms to or changing the terms of an integrated plea agreement.") (internal quotations omitted), *cert. denied*, 117 S. Ct. 742 (1997); *United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994) ("Although circumstances surrounding the agreement's negotiations might indicate [the defendant's] intent [in entering into plea agreement], parol evidence is inadmissible to prove the meaning of an unambiguous plea agreement."); *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (holding that extrinsic evidence is inadmissible to prove meaning of plea agreement that is "unambiguous on its face"), *cert. denied*, 507 U.S. 997 (1993). The Tenth Circuit below similarly rejected the use of a "relaxed" parol evidence rule in the interpretation of plea agreements. App. 9a-12a. The court affirmed the trial court's refusal to hear Rockwell's evidence, which was offered to explain the intended meaning of, and Rockwell's reasonable understanding of, the plea agreement's declination provision.

The states that have addressed the issue have no uniform answer. For example, while Iowa has suggested that extrinsic evidence may not be considered unless the

plea agreement is determined to be "ambiguous,"[14] Colorado holds the contrary view:

> [I]t is appropriate for a trial court to consider not only the form and content of any written document purporting to incorporate the government's representations to the defendant but also any oral statements made to the defendant as well as extrinsic evidence relating to the circumstances of the government's dealings with the defendant. Consideration of extrinsic evidence is especially appropriate when the written document itself is ambiguous. Under such circumstances, a court's task is not to rewrite the agreement but to construe it in a manner consistent with the intent of the parties and the defendant's right to be treated fairly by the government.

People v. Romero, 745 P.2d 1003, 1010 (Colo. 1987), *cert. denied*, 485 U.S. 990 (1988); *accord People v. Payseno*, 1997 WL 637817, at *2 (Colo. Ct. App. Oct. 16, 1997).

B. The parol evidence rule, when correctly applied, is not a rule of evidence which precludes a party from demonstrating that the words of a contract have context.

There are two inescapable ironies about the decisions of those circuit courts that insist on applying a "strict" parol evidence rule. The first is that, while these courts recognize the due process clause's requirement that the plea agreement must be interpreted so that a defendant's

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[14] *See Ridinger v. State*, 341 N.W.2d 734, 736-37 (Iowa 1983).

"reasonable understanding" of the agreement is effectuated, they provide no *means* for the defendant to establish its "reasonable understanding." Below, Rockwell's considerable, and undisputed, evidence would have established why the *Stone* declination provision appeared in the plea agreement when the agreement had just stated that it did not "encompass (or preclude) . . . the issues" raised in *Stone*. But this evidence was deemed barred by the "parol evidence rule" and was never considered.

The second irony is that when the parol evidence rule – a substantive rule of contract law (but not a rule of evidence)[15] – is thoughtfully applied, it must *not* be applied so woodenly and formulaically that it distracts courts from their judicial function of uncovering and effectuating what the parties intended when they used particular words and phrases. Its application need not be "relaxed" or "strict." The rule should, in fact, be used uniformly to "insure the defendant what is reasonably due in the circumstances," *Santobello*, 404 U.S. at 262, by helping to uncover the parties' intentions.

As Chief Justice Traynor stated in his seminal decision on the parol evidence rule, the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be "plain and unambiguous on its face," but whether the offered evidence is "relevant to prove a meaning to which the language of the instrument is *reasonably susceptible.*" *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging*

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[15] *E.g.*, 3 Arthur L. Corbin, *Corbin on Contracts* § 573, at 357-58 (1960).

Co., 442 P.2d 641, 644, 645 (Cal. 1968) (emphasis supplied). This test, Justice Traynor held, flows from the inherent fluidity of the meaning of words:

> Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. *The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility . . . exists whenever the parties' understanding of the words used may have differed from the judge's understanding.*

Id. at 645 (emphasis supplied).[16]

The "parol evidence" rule in short must be applied in a way that recognizes the reality that words are "inexact tools" of our language, *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943). As Professor Corbin noted, "words do not define themselves," and their relevant meaning in a particular context depends on the "meaning" ascribed to them by their users. *See* Corbin, *supra*, § 536, at 27; *see*

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[16] *See, e.g., Nash v. Towne*, 5 Wall. (U.S.) 689, 699 (1866); *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 310-15 (2d Cir. 1955) (Frank, J., concurring); *New York Trust Co. v. Island Oil & Transp. Corp.*, 34 F.2d 655, 655-56 (2d Cir. 1929) (Learned Hand, J.); Restatement, *supra*, § 202 cmt. c, § 212 cmt. b, § 214 & cmt. a, § 215 cmt. b (1981); 3 Arthur L. Corbin and Lawrence A. Cunningham & Arthur J. Jacobson, *Corbin on Contracts* § 542, at 94-95 (1960 & Supp. 1997); 4 Samuel Williston & Walter H.E. Jaeger, *Williston on Contracts* §§ 609, 629 (3d ed. 1961).

David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 Cath. U. L. Rev. 81, 101-02 (1991) ("Regardless of the particular theory invoked, the underlying point of modern psycholinguistic research is the subjectivity of meaning. . . . Meaning is found not in the symbol but in the stored memory of the reader.").

In contractual interpretation and statutory construction, this Court has recognized that words have meaning only in context and that the overarching goal is effectuating the contracting parties' intent, of "doing justice to the parties before it," Corbin, *supra*, § 539, at 80. *See, e.g., Nash v. Towne*, 5 Wall. (U.S.) 689, 699 (1866) ("[Courts] are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."); *Deal v. United States*, 508 U.S. 129, 131-32 (1993) ("[A] fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' ") (citations omitted; quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)); *cf. Ornelas*, 116 S. Ct. at 1661 (noting that probable cause and

reasonable suspicion are not "finely-tuned standards" but "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed").

When courts of appeals erect the parol evidence rule as a shield which bars evidence that sheds light on the meaning of a plea agreement's terms, there is special irony. Notwithstanding *Santobello*'s guarantee of "reasonableness" to criminal defendants, the courts in *civil* cases have routinely used the parol evidence rule in the way *Nash* suggested – to learn of and effectuate the intentions of *commercial* contractors. For example, in a breach-of-contract action between two lending institutions, the Third Circuit stated:

> It is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a *reasonable* alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder.

Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (emphasis supplied; footnote and citation omitted).[17]

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[17] *See, e.g., Sumitomo Mach. Corp. of Am. v. Allied Signal, Inc.*, 81 F.3d 328, 332 (3d Cir. 1996) ("extrinsic evidence is permitted because the law recognizes that the meaning of words can depend on context, and what may seem unambiguous without

In interpreting plea agreements, the failure to recognize the parol evidence rule as a tool to effectuate the contracting parties' intentions rather than as a prophylactic rule of evidence is a grievance of constitutional dimension. It undercuts *Santobello*'s guarantee; it "call[s] into question" "the consensual character of the plea," *Mabry*, 467 U.S. at 508-09; and it frustrates the defendant's right to "get[] the benefit of his bargain," *Hyde*, 117 S. Ct. at 1634.

This was demonstrated below. Rockwell's evidence established that the declination provision was not a routine inclusion of an irrelevant fact. Rather it reflected the parties' agreement, and Rockwell's reasonable understanding, that while the government was not required to release *all* its rights in the *qui tam* suit, it *would be required to decline* intervention, unless it could prove that it had substantial new evidence of fraud. This was a valuable

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context . . . may be ambiguous when understood from the linguistic reference point of the parties") (internal quotations omitted); *American Cyanamid Co. v. Fermenta Animal Health Co.*, 54 F.3d 177, 181 (3d Cir. 1995) ("Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement.") (internal quotations omitted); *Crescent Oil & Shipping Servs., Ltd. v. Phibro Energy, Inc.*, 929 F.2d 49, 52 & n.11 (2d Cir. 1991) ("There are, indeed, a good many cases holding that the words of a writing are too 'plain and clear' to justify the admission of parol evidence as to their interpretation. In other cases, it is said that such testimony is admissible only when the words of the writing are themselves 'ambiguous.' Such statements assume a uniformity and certainty in the meaning of language that do not in fact exist; they should be subjected to constant attack and disapproval.") (internal quotations omitted).

concession from the government, in part because Rockwell had voluntarily, liberally and deliberately disclosed inculpatory documents and facts pertaining to alleged environmental violations so that the government would never have a basis for later intervention.

The declination provision, in short, meant *something* to the parties, or there would have been no need to include it and to pay an additional $3 million for it. Because it was placed in the paragraph in which the government generally excluded *Stone* from its covenant not to sue, the declination provision on its face at least *reasonably suggested* that the provision *itself* was an exception to the general *Stone* exclusion. *See, e.g., Bailey v. United States*, 116 S. Ct. 501, 506 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal quotations omitted). The proof that the parties in fact intended this result – and that Rockwell's guilty plea "rest[ed] . . . on [this] promise . . . [such] that it c[ould] be said to be part of the inducement or consideration," *Santobello*, 404 U.S. at 262 – resided in the evidence which the Tenth Circuit and the district court refused to consider. Other courts of appeals would have allowed this evidence.

CONCLUSION

In his dissent in *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987), Justice Brennan observed that "[t]his Court has yet to address in any comprehensive way the rules of

construction appropriate for disputes involving plea agreements." In the absence of controlling authority, the federal courts of appeals are in disarray over the standard properly to be applied in reviewing interpretations of plea agreements, the currency used so often to dispose of criminal cases. Further, they do not agree on, and criminal defendants cannot be assured, whether the defendant will be permitted to introduce *any* evidence about the meaning of a plea agreement and the defendant's reasonable understanding of that agreement when a court has decided the agreement is "integrated." The courts below used rigid applications of two rules of avoidance – "clear error" review and the "parol evidence rule" – to improperly defeat Rockwell's reasonable understanding of the plea agreement here. These two issues each merit this Court's plenary review.

Respectfully submitted,

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APPENDIX

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Memorandum Opinion of the Trial Court, *United States v. Rockwell Int'l Corp.*, No. 92-CR-107 (D. Colo. Nov. 19, 1996) 16a

Order of the United States Court of Appeals for Tenth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* 27a

UNITED STATES of America,
Plaintiff-Appellee,

v.

ROCKWELL INTERNATIONAL CORPORATION, Defendant-Appellant.

No. 96-1530.

United States Court of Appeals,
Tenth Circuit.

Aug. 26, 1997.

Rehearing Denied Oct. 15, 1997.

Harold A. Haddon (Rachel A. Bellis with him on the brief), Haddon, Morgan & Foreman, P.C., Denver, CO, for Defendant-Appellant.

Douglas N. Letter, Department of Justice, Washington, DC, for Plaintiff-Appellee.

Before BRISCOE, LOGAN and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

In 1992, Rockwell International Corporation entered into a plea agreement with the United States (the "government"), pleading guilty to various environmental crimes and agreeing to pay a fine of $18.5 million. In return, the government promised to refrain from further criminal and, to a lesser extent, civil proceedings. Rockwell appeals the district court's refusal to entertain its interpretation of that plea agreement, an interpretation that would forbid the government from intervening in a

qui tam action against Rockwell. We conclude that the district court was correct to reject Rockwell's proposed reading of the plea agreement, and affirm.

I

Rockwell operated the U.S. Department of Energy's Rocky Flats Nuclear Weapons Plant just outside Denver, Colorado. In 1988, the criminal division of the Department of Justice, as well as other federal agencies, began investigating allegations that Rockwell had committed environmental crimes at Rocky Flats. After obtaining a federal warrant and conducting an extensive search of the facility in 1989, the government seized a very large volume of documents and a special grand jury was empaneled to investigate Rockwell's operation of Rocky Flats. Also in 1989, James Stone, as relator, filed a qui tam complaint against Rockwell in district court in Colorado, pursuant to 31 U.S.C. § 3730 (the "Stone Suit"). Stone's complaint alleged that Rockwell had violated the False Claims Act, 31 U.S.C. § 3729, by submitting improper reimbursement applications to the Department of Energy and committing other wrongful acts in its operation of Rocky Flats.

In compliance with 31 U.S.C. § 3730(b), the complaint in the Stone Suit was filed under seal and served on the United States but not on Rockwell. Because the government sought and was granted extensions to keep the complaint under seal, Rockwell was not given notice of the Stone Suit until November 1990. Even after the complaint was unsealed, the United States, acting through the civil division of the Justice Department, continued to

delay the decision on whether to elect to prosecute the qui tam action. In the meantime, Rockwell filed a suit against the United States in the Court of Federal Claims (the "Claims Court Suit"), alleging that the Department of Energy had breached contractual obligations and had improperly withheld fees owing to Rockwell for operating Rocky Flats. During this time, proceedings before the grand jury continued.

In 1991, the government and Rockwell's counsel entered into substantial plea negotiations, discussing the possibility of a global resolution of all suits and investigations involving Rockwell's management of Rocky Flats. The negotiations culminated in a written plea agreement executed on March 26, 1992, an agreement that fell short of the full resolution sought by Rockwell. The five-page agreement specified that Rockwell would waive the necessity of indictment, plead guilty to ten environmental criminal charges and pay a fine of $18.5 million. In return, the government promised not to bring any further environmental criminal charges against the corporation or its officers, directors or employees stemming from Rockwell's management of Rocky Flats as then known by the government. The government also promised not to sue or take other administrative action against Rockwell based on violations of certain environmental statutes. Specifically, provision 5 of the agreement states:

> In connection with this disposition, the United States agrees that, as to all environmental matters at Rocky Flats which are presently known to the Department of Justice or the Environmental Protection Agency ("EPA") on the date of this agreement, the United States covenants not to

> sue or take administrative action against Rockwell for civil damages, penalties or other monetary relief based upon alleged violations of RCRA, the CWA, § 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, or the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*

Appellant's App. at 500.

However, provision 5 expressly excludes from the government's promise not to sue three areas of potential civil liability. Directly following the above-quoted language, the agreement states:

> This covenant does not encompass (or preclude) (a) claims for recovery of response costs, natural resource damages or injunctive relief brought pursuant to RCRA, CERCLA or other authority, or for civil or administrative penalties arising in connection with such relief or a consent decree or administrative order mandating such relief; (b) the ongoing civil or administrative investigation of possible violations of 40 C.F.R. Part 761 concerning polychlorinated biphenyls ("PCBs") at Rocky Flats, including, without limitation, Building 707; or (c) the issues raised in *United States of America, ex rel., and James S. Stone v. Rockwell International Corporation*, Civil Action No. 89-C-1154 (D.Colo.) ("*Stone*"). After an independent review, the Department of Justice-Civil Division has determined to file a notice in Stone declining to intervene.

Id. at 500-01. The agreement contains an integration clause stating there are no other agreements, terms, or

conditions, express or implied, and that entering the agreement, neither parties relies on any terms, promises, or conditions not expressed therein. *Id.* at 503. The plea agreement was accepted by the court in June 1992.

The same day Rockwell executed the plea agreement, the Department of Justice-Civil Division filed in the Stone Suit a notice of its election not to intervene in the qui tam action. The notice states: "The United States also reserves its rights under 31 U.S.C. § 3730(c)(3) to intervene at a later date upon a showing of good cause." *Id.* at 505.

In November 1995, citing information revealed in pending civil litigation with Rockwell, the government moved to amend its answer to Rockwell's complaint in the Claims Court Suit to interpose a fraud defense/counterclaim. In July 1996, the Court of Federal Claims allowed the government to file the amended answer. Also in November 1995, the government moved to intervene in the Stone Suit. Rockwell responded with this action. The company asserted that the attempt to intervene breached the 1992 plea bargain and requested the district court to enforce that agreement.

In separate orders, the district court denied Rockwell's motion to enforce the plea agreement and granted the government's motion to intervene in the Stone Suit. The court found the terms of the plea agreement clear with respect to the government's limitation on its promise not to pursue civil actions, and found no ambiguity in what it characterized as the "statement of fact" that the Department of Justice-Civil Division had previously determined to file a statement in the Stone Suit declining to intervene. *Id.* at 189. The court rejected Rockwell's

attempt to introduce a large volume of material describing the history of the plea agreement negotiations. According to Rockwell, this evidence demonstrates that it understood the government's obligation to include a promise not to intervene at a later date unless new and significant information on the complexity or magnitude of the fraud was revealed. The court concluded that

> Rockwell cannot credibly argue that it did not understand the government's consideration for its guilty pleas to encompass only a promise not to pursue civil or administrative remedies for violations of the RCRA, the CWA, § 103 of the CERCLA, the Clean Air Act, and the Toxic Substances Control Act. The plea agreement did not contain a covenant not to pursue civil remedies for any violation of the False Claims Act, and it expressly excluded any covenant with respect to the *Stone* case.

Id. at 192. It is in this posture the case comes before us.

II

On appeal, Rockwell raises two issues, both related to the district court's interpretation of the plea agreement. The first is that the district court improperly refused to consider Rockwell's interpretation of the plea agreement and enforce it according to those terms. The second is that the district court impermissibly refused to grant an evidentiary hearing to consider the evidence supporting Rockwell's interpretation of the agreement.

According to Rockwell, the language of the plea agreement reflects negotiations with the government in which it attempted to ensure no financial liability apart

from the $18.5 million fine it agreed to pay as part of its guilty pleas. Rockwell tells us that in order to effectuate this goal, it attempted to get the United States Attorney for the District of Colorado and the Criminal Division of the Justice Department to commit the Justice Department-Civil Division to stay out of the Stone Suit. Rockwell alleges that Justice Department attorneys consistently indicated that the government did not intend to intervene in the Stone Suit, but that the Civil Division attorneys were unwilling to commit that assurance to writing. Recognizing its leverage, Rockwell alleges the government extracted $3 million more in fines than Rockwell had previously agreed to pay in return for declining to intervene. Rockwell suggests an understanding that the government might only later intervene if it obtained significant new information increasing the scope and complexity of the fraud. Allegedly in order to forestall future intervention based on the discovery of new information, Rockwell turned over additional incriminating documents before the plea agreement was executed.

Much of the evidence offered by Rockwell to support its reading of the agreement explains why it believed that the declination of intervention included a limit on future intervention. If the government initially declines to take over the qui tam suit, then, as noted in the government's declination of intervention, § 3730 only allows the government later to intervene upon a showing of "good cause." 31 U.S.C. § 3730(c)(3). The proposed evidence includes correspondence between the government and Rockwell's attorneys, transcripts of testimony by Department of Justice prosecutors, and legislative history of the qui tam provisions of the FCA, confirming Rockwell's

reasonable understanding that the definition of "good cause" seriously circumscribed the government's ability to later intervene. Rockwell admits that all this evidence is extrinsic to the plea agreement itself, but insists it is nevertheless admissible and necessary to explain Rockwell's understanding of the plea agreement.

Due process requires "that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *see also Mabry v. Johnson*, 467 U.S. 504, 508-11, 104 S.Ct. 2543, 2546-48, 81 L.Ed.2d 437 (1984) (noting consensual elements of knowing and intelligent plea require defendant to have a fair understanding of plea bargain's consequences). Rules of contract law inform the interpretation and enforcement of promises in a plea agreement. *United States v. Cooper*, 70 F.3d 563, 565 (10th Cir.1995); *see also Blackledge v. Allison*, 431 U.S. 63, 75 n. 6, 97 S.Ct. 1621, 1630 n. 6, 52 L.Ed.2d 136 (1977). If we find that the government breached the plea agreement we must remand the case either for specific performance or to allow the defendant to withdraw its guilty plea. *Santobello*, 404 U.S. at 262-63, 92 S.Ct. at 498-99.

We review de novo whether the government's conduct violates the plea agreement, but the district court's interpretation of the agreement is reviewed for clear error. *Allen v. Hadden*, 57 F.3d 1529, 1534 (10th Cir.1995). The district court's decision to deny an evidentiary hearing is reviewed for an abuse of discretion. *United States v. Packwood*, 848 F.2d 1009, 1010 (9th Cir.1988). A court applies a two-step process in interpreting the terms of a

plea bargain: first, the court examines the nature of the government's promise; second, the court investigates this promise based upon the defendant's reasonable understanding at the time the guilty plea was entered. *Cunningham v. Diesslin*, 92 F.3d 1054, 1059 (10th Cir.1996). We "will not allow the government to resort to a rigidly literal construction of the language of the plea agreement" to frustrate a defendant's reasonable expectations. *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir.1989). However, the government's obligations to the defendant do not issue from mere silence. *United States v. Furman*, 112 F.3d 435, 439 (10th Cir.1997) ("We shall not impose duties on the government that are not an express or implied part of its agreement with the defendant.").

Here, the district court found that the plea agreement expressly excluded any covenant not to sue with respect to the Stone Suit. Appellant's App. at 189. Under *Cunningham*, we therefore examine the scope of the government's promise in light of Rockwell's reasonable understanding at the time it entered its guilty plea. In this case, however, the second-step reasonableness inquiry is severely limited by the integration clause contained in the plea agreement. *See Blackledge*, 431 U.S. at 75 n. 6, 97 S.Ct. at 1630 n. 6. The parol evidence rule bars the court from considering evidence of terms outside of an integrated written agreement.

The parol evidence rule is as much one of substantive contract law as it is an evidentiary rule. *See generally* Arthur L. Corbin, 3 *Corbin on Contracts* § 573 (1960). Under it, extrinsic evidence may not be admitted to contradict the terms of a binding integrated agreement or to add to the terms of a binding and completely integrated

agreement. Restatement (Second) of Contracts §§ 215, 216. An "integrated agreement" exists when the parties to a contract have reduced to a final written expression one or more terms of their agreement. *Id.* § 209(1). "A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement." *Id.* § 210(1). Merely because a writing claims to be a final and exclusive expression of the parties' agreement does not in itself prohibit the court from looking beyond the document to see if other agreements exist between the parties. *See id.* § 209 comment b; *Blackledge*, 431 U.S. at 75 n. 6, 97 S.Ct. at 1630 n. 6.

The written plea agreement in this case appears on its face to be completely integrated. Provision 12 provides: "This document states the parties' entire agreement. There are no other agreements, terms, or conditions, express or implied. In entering this agreement, neither the Department of Justice nor Rockwell have relied, or are relying, on any terms, promises, or conditions not expressly stated herein." Appellant's App. at 503. Rockwell does not contend that the written agreement is not the parties' final and complete expression; in fact, in the district court Rockwell itself asserted the integration of the plea agreement to bar consideration of the Department of Justice-Civil Division's notice of declination in the Stone Suit. *See* Appellant's App. 78-79; 130-31 (statement of Mr. Koenigs); *see also* Restatement (Second) of Contracts § 209(3) (in absence of contrary evidence, a writing that appears integrated will be considered as such); *Blackledge*, 431 U.S. at 75 n. 6, 97 S.Ct. at 1630 n. 6 (provision denying existence of other agreements or

terms carries great weight). Thus, if Rockwell's extrinsic evidence is offered to prove its reasonable understanding that the plea agreement contained an additional term, the parol evidence rule will bar our consideration of that understanding. Rockwell offers its evidence for exactly this purpose.

The plea agreement in this case contains no promise by the government limiting its ability to intervene in the Stone Suit to a showing of good cause. Not only is the term "good cause" absent from the written plea agreement, the only covenant by the government not to sue appears in provision 5, and that provision specifically excludes the Stone Suit from the covenant not to sue. The language relied upon by Rockwell to support its view of the government's obligations is the statement: "After an independent review, the Department of Justice-Civil Division has determined to file a notice in *Stone* declining to intervene." Appellant's App. 500-01. The district court considered the quoted sentence and found it to be not a promise, but a statement of fact. *Id.* at 189. Such an interpretation of the agreement is not clearly erroneous.

What Rockwell really seeks is to add a term to the agreement. According to Rockwell, the plea agreement precludes the government from suing for damages based on violations of environmental law other than (*inter alia*) the issues in the Stone Suit, *except* that the government can only sue in the Stone Suit upon satisfying Rockwell's understanding of the statutory phrase "good cause." This, however, is not how the plea agreement is written. Regardless of whether Rockwell's extrinsic evidence vindicates its assertion that the government agreed to be so

limited in intervening in the Stone Suit, the parol evidence rule forbids Rockwell from asserting this additional term. *See* Restatement (Second) of Contracts § 216; *see also United States v. Ajugwo*, 82 F.3d 925, 928-29 (9th Cir.1996) (excluding evidence of additional term where plea agreement found to be completely integrated); *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir.1986) (same). Cases cited by Rockwell to demonstrate a relaxed application of the parol evidence rule in the plea bargain context all involve admission of extrinsic evidence to explain the terms of the agreement itself. *See U.S. v. Swinehart*, 614 F.2d 853, 858 (3rd Cir.1980); *Kingsley v. United States*, 968 F.2d 109, 114-15 (1st Cir.1992).

United States v. Garcia, 956 F.2d 41, 42-44 (4th Cir.1992), also cited by Rockwell, involved admitting parol evidence to prove that an additional term existed, notwithstanding the apparently unambiguous nature of the written plea agreement itself. In that case, however, it was clear that there was no dispute as to the government's contemporaneous additional promise and no evidence that the additional agreement was extinguished by an integration clause. In fact, the additional promise, contained in the plea agreement's cover letter, indicated that the term was included in the plea agreement itself. That case was closer to a demonstration that the government may not in bad faith make a promise to a defendant who speaks almost no English, then repudiate it merely because of the existence of a written agreement mistakenly omitting the promise. *See, e.g., Blackledge*, 431 U.S. at 75 n. 6, 97 S.Ct. at 1629 n. 6 (mistake or fraud can vitiate even writing purporting to be completely integrated). Rockwell does not argue that the integration

clause incorrectly manifests its understanding of the scope of the written agreement. The district court was correct to conclude that the government's efforts to intervene in the Stone Suit were not breaches of the plea agreement. In light of the agreement's complete integration into the writing, any understanding to the contrary is simply unreasonable.

Even if Rockwell's interpretation of "good cause" in the qui tam statute is reasonable, it is not a reasonable understanding of the government's promise in the plea agreement. The qui tam statute is not referenced in the plea agreement, which expressly excludes the Stone Suit from its covenants. At most, Rockwell's evidence suggests that it was under the impression that a declination of intervention would severely preclude the government from later intervening and that the government did nothing to dissuade Rockwell from such an understanding. This belief exists apart from the plea agreement, however, is based on the statute, and is an issue to be resolved in the Stone Suit.

For similar reasons, we do not believe the district court abused its discretion in ruling on Rockwell's motion without granting an evidentiary hearing. We will not disturb a district court's discretionary decision unless we have a firm and definite conviction that it made a clear error of judgment or went beyond the boundaries of permissible choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir.1994). Rockwell claims that the district court refusal to grant an evidentiary hearing is a manifestation of the court's conclusion that as a corporation, it is not

entitled to the due process protections afforded individual defendants. To support its position, Rockwell seizes on language from the district court's order:

> The defendant [Rockwell] cites cases that require interpretation of criminal plea agreements according to the reasonable understanding of the defendant. In those cases, the courts were concerned with due process protection of the accused and it is not uncommon for the individual offender to have an imperfect understanding of the legal issues or to have his understanding be something different from that of his attorney. That is, of course, not possible where the defendant is a corporation. Rockwell cannot credibly argue that it did not understand the government's consideration for its guilty pleas to encompass only a promise not to pursue civil or administrative remedies for violations of [various environmental statutes]. The plea agreement did not contain a covenant not to pursue civil remedies for any violation of the False Claims Act, and it expressly excluded any covenant with respect to the *Stone* case.

Appellant's App. at 192.

Rockwell is correct that a corporate defendant is entitled to the protections of the Due Process Clause. *See, e.g., BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We do not read the quoted language from the district court to mean it did not consider Rockwell entitled to due process. Rather, we understand the court to have found that Rockwell had the same understanding of the plea agreement that its counsel had. Rockwell does not claim that its attorneys

misled it in explaining the plea agreement's consequences. Rockwell's attorneys simply could not have understood the plea agreement to include a term not within the completely integrated written instrument, and the district court merely held the corporation to that same understanding. Because the evidence proffered by Rockwell could not reasonably have led it to the understanding of the agreement it now asserts, the court did not abuse its discretion in denying Rockwell an evidentiary hearing.

III

For the reasons stated herein, the district court's denial of Rockwell's motion to enforce the plea agreement is **AFFIRMED**.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Criminal Action No. 92-CR-107

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Nov. 19, 1996)

MATSCH, Chief Judge

On December 18, 1995, the defendant, Rockwell International Corporation, filed a motion for an order enforcing the written plea agreement accepted by Judge Sherman G. Finesilver on June 1, 1992. The occasion for the motion was the government's filing on November 14, 1995, of a motion to intervene in a *qui tam* False Claims Act case, pending in this jurisdiction, *United States of America ex rel. James S. Stone v. Rockwell International Corporation*, Civil Action No. 89-C-1154 (*"Stone"* case) (now 89-M-1154). That civil action was initiated by a complaint filed by James S. Stone, as relator, on July 5, 1989. The first claim for relief alleged that Rockwell, as contractor operating the Department of Energy facility at Rocky Flats, Colorado, committed wrongful acts and submitted false records or statements to the United States to obtain approval and payment of claims for reimbursement of

costs and applications for fee awards under the contract. The complaint contains conclusory allegations of concealment of numerous and continuous violations of environmental and safety laws and regulations which, if known to the government, would have prevented such payments to Rockwell.

This criminal case was initiated by a waiver of indictment and the filing of an Information on March 26, 1992. The information was filed pursuant to a carefully negotiated written plea agreement, and Rockwell immediately pleaded guilty to four counts charging violations of the Resource Conservation & Recovery Act, 42 U.S.C. § 6928(d)(2)(A) and (C), and six counts charging violations of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) and (2)(A). The plea agreement called for fines totalling $18.5 million as the appropriate penalties for these environmental crimes under Fed. R. Crim. P. 11 (e)(1)(C). On the same date these guilty pleas were entered, March 26, 1992, the government filed a notice that it declined to intervene in the *Stone* case, pursuant to 31 U.S.C. § 3730.

In paragraph 1 of the plea agreement the government made the following promise in exchange for the guilty pleas:

> 1. Pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), Rockwell will plead guilty to ten criminal charges involving violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, as set forth in the attached charging document. In return, the United States will not bring other environmental criminal charges (or

environmentally-related conspiracy, fraud or false statement criminal charges) against Rockwell or its present or former officers, directors or employees, as to all such environmental and environmentally-related matters concerning Rocky Flats which are presently known to the Department of Justice on the date of this agreement.

In addition, the United States included the following covenant not to sue in in [sic] the plea agreement.

5. In connection with this disposition, the United States agrees that, as to all environmental matters at Rocky Flats which are presently known to the Department of Justice or the Environmental Protection Agency ("EPA") on the date of this agreement, the United States covenants not to sue or take administrative action against Rockwell for civil damages, penalties or other monetary relief based upon alleged violations of RCRA, the CWA, § 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, or the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*

This covenant does not encompass (or preclude) (a) claims for recovery of response costs, natural resource damages or injunctive relief brought pursuant to RCRA, CERCLA or other authority, or for civil or administrative penalties arising in connection with such relief or a consent decree or administrative order mandating such relief: (b) the ongoing civil or administrative investigation of possible violations of 40 C.F.R. Part 761 concerning polychlorinated biphenyls ("PCBs" at rocky Flats, including,

without limitation, Building 707; or (c) the issues raised in *United States of America, ex rel., and James S. Stone v. Rockwell International Corporation,* Civil Action No. 89-C-1154 (D. Colo.) (*"Stone"*). After an independent review, the Department of Justice Civil Division has determined to file a notice in *Stone* declining to intervene.

In August, 1991, Rockwell sued the government in the United States Court of Federal Claims in *Rockwell v. United States,* Case No. 91-1362C, claiming breach of contract by the Department of Energy and seeking approximately 6.5 million dollars in award fees for the operation of the Rocky Flats plant from October 1, 1988 through September 30, 1989. In that action, Rockwell challenges a reduction in award fees based on the evaluation of its performance in the Environment, Safety, and Health ("ES&H") requirements of its contract.

The government now claims that discovery conducted in that civil action by counsel in the Commercial Litigation Branch of the Civil Division of the Department of Justice, revealed evidence that Rockwell concealed and misrepresented environmental law violations as alleged in the *Stone* case. Additionally, in his declaration filed in support of the motion to intervene in the *Stone* case, John A. Kolar, DOJ Trial Attorney, informed that counsel for Mr. Stone has provided more documents and information supporting his allegations of fraudulent concealment. Mr. Kolar has explained that this is new evidence to the Civil Division which did not share in the information developed by the prosecutors in the investigation leading to this criminal case because of the grand jury secrecy

requirements of Rule 6(e) of the Federal Rules of Criminal Procedure.

The False Claims Act, in 31 U.S.C. § 3730(c)(3), authorizes the government to change its position and move to intervene upon a showing of "good cause." Fed. R. Civ. P. 24(b) permits intervention by a government agency in any civil action when a party relies on any statute or executive order administered by that agency. The application to intervene must be timely and not be prejudicial to the rights of the original parties. Rockwell filed its opposition to the motion to intervene and the relator, Stone, filed his supporting briefs. Rockwell's principal argument is the same contention made here – that intervention violates the plea agreement.

On July 17, 1996, Judge Yock in the Court of Federal Claims entered an order granting the motion of the United States to file a first amended answer asserting fraud counterclaims. That court reviewed the discovery history in that case and concluded that Rockwell would not suffer undue prejudice from permitting the government to proceed with a Special Plea of Fraud under 28 U.S.C. § 2514 and to assert False Claims Act counterclaims. The court noted that the government's discovery was not fully answered until January 1995, observing that Rockwell had resisted document requests and made repeated objections to discovery.

This court has entered a memorandum opinion and order in the *Stone* case finding good cause under its interpretation of the False Claims Act and finding that neither Stone nor Rockwell will be prejudiced by permitting the government to take over the prosecution of the

claims in that case. Thus, the only impediment now is whether the court should use its equitable power to prevent the Department of Justice from proceeding in the *Stone* case because intervention violates the plea agreement.

In *Santobello v. New York*, 404 U.S. 257, 262 (1971), the Supreme Court held that an offender can obtain specific performance of his plea agreement because the failure to perform the bargained promise would deny due process. Contract principles are applicable to plea agreements. *United States v. $87,118.00 in United States Currency*, 95 F.3d 511, 516 (7th Cir. 1996); *United States v. Hawley*, 93 F.3d 682, 692 (10th Cir. 1996). The initial question is whether there is any ambiguity in the language of this agreement. The government points out that the express language of the covenant not to sue in paragraph five specifically excludes the issues raised in the *Stone* case. The sentence regarding the decision of the Department of Justice – Civil Division to file a notice not to intervene in *Stone* is simply a statement of fact as of the time of the plea agreement and does not, by its own terms, preclude later intervention.

Counsel for Rockwell make much of the negotiating history of the plea agreement and claim that Rockwell's understanding of the agreement was that DOJ would intervene in *Stone* only if it obtained "new and significant" evidence that "escalated the magnitude or complexity of the fraud" alleged in *Stone*, in addition to reliance on the negotiations leading to the increase in the amount of the agreed fines to $18.5 million in exchange for greater protection, Rockwell relies on the legislative history of § 3730(c)(3) to "intervene at a later date upon a

showing of good cause" by noting the following language from Senate Rep. No. 99-345, 26-27, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5291-92 (emphasis added):

> Conceivably, *new evidence discovered after [the Government elects not to intervene] could escalate the magnitude or complexity of the fraud,* causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where *new and significant evidence* is found and the Government can show "good cause" for intervening, paragraph [3] provides that the court may allow the Government to take over the suit.

The defendant claims that the Civil Division of DOJ has long had access to the information necessary to make a decision about intervention because non-grand jury material was supplied to it, including many documents submitted by Rockwell. The defendant contends that the non-grand jury materials included all of the evidence that the government now relies on in this motion to intervene.

There is no feasible way for the court now to evaluate the merits of Rockwell's contention that the Civil Division of the Department of Justice cannot meet the new evidence requirement according to Rockwell's interpretation of the plea agreement. A measured response would require the court to review the large volume of material involved and that is not the mission of the court. As noted in C. Wright and A. Miller, *Federal Practice and Procedures,* § 1912 at p. 373-74 (1986), the common interpretation of Rule 24(b) is to allow intervention liberally to

government agencies and officers seeking the opportunity to assert the public interest in litigation initiated by other parties. Here there are two significant areas of public interest involved. One is protection against improper expenditure of public funds as a result of fraudulent inducement and the second is the intense interest in the protection of the environment where hazardous waste is generated in the operation of a facility with the public purpose of providing for the national defense. Unless the government limited its authority and discretion in the plea agreement, the law does not require the court to undertake a factual analysis to decide whether the government has made such a showing of new evidence. The controlling questions are whether the Department of Justice has acted in bad faith and whether there is any actual prejudice to Rockwell or to Stone. As to Stone, it is clear that his interests are aligned with that of the government because he has supported intervention and, indeed requested it, it is difficult to see how Rockwell will suffer any prejudice now that the Court of Federal Claims has permitted the government to raise these same fraud issues in its amendment counterclaim.

There is an additional element of public interest involved here and that is the concern raised by the former members of the grand jury conducting the investigation of Rocky Flats that the negotiated plea agreement did not result in a just disposition. They have filed a separate civil action seeking to be released from the grand jury oath of secrecy under Rule 6(e) of the Criminal Rules. *In Re Special Grand Jury 89-2*, Miscellaneous No. 96-Y-203. That is a matter yet to be heard. Its relationship to this case is apparent. There is a broad and abiding public

interest in knowing the true story at Rocky Flats Weapons Plant that can best be addressed in litigation.

The defendant cites cases that require interpretation of criminal plea agreements according to the reasonable understanding of the defendant. In those cases, the courts were concerned with due process protection of the accused and it is not uncommon for the individual offender to have an imperfect understanding of the legal issues or to have his understanding be something different from that of his attorney. That is, of course, not possible where the defendant is a corporation. Rockwell cannot credibly argue that it did not understand the government's consideration for its guilty pleas to encompass only a promise not to pursue civil or administrative remedies for violations of the RCRA, the CWA, § 103 of the CERCLA, the Clean Air Act, and the Toxic Substances Control Act. The plea agreement did not contain a covenant not to pursue civil remedies for any violation of the False Claims Act, and it expressly excluded any covenant with respect to the *Stone* cases. Upon the foregoing, it is

ORDERED that the defendant's motion for order enforcing plea agreement, filed December 18, 1995, is denied.

DATED: November 19, 1996

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch,
Chief Judge

Case Number: 92-CR-107

I certify that I mailed a copy of the attached Memorandum Opinion and Order entered by Chief Judge Richard P. Matsch on November 19, 1996, to the following:

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JAMES R. MANSPEAKER, CLERK

By: /s/ _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	
ROCKWELL INTERNATIONAL CORPORATION, Defendant-Appellant.	)	No. 96-1530

ORDER
Filed October 15, 1997

Before **BRISCOE, LOGAN** and **LUCERO,** Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc,

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By: /s/ _____
Deputy Clerk